

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN W. SMITH,)	
)	No. CV-10-00005-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on April 8, 2011 (Ct. Rec. 13, 18). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Commissioner). The parties consented to proceed before a magistrate judge (Ct. Rec. 6). On December 13, 2010, plaintiff filed a reply (Ct. Rec. 20). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 18) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

JURISDICTION

Plaintiff protectively applied for disability insurance benefits (DIB) and supplemental security income (SSI) benefits on

1 June 17, 2003, alleging amended onset as of July 1, 2003, due to
2 narcissistic personality disorder, mixed personality disorder,
3 and depression (Tr. 170-172, 204, 456-458, 518). The applications
4 were denied initially and on reconsideration. Administrative Law
5 Judge (ALJ) Paul L. Gaughen held the most recent hearing December
6 12, 2007¹. Plaintiff, represented by counsel, and a vocational
7 expert testified (Tr. 552-568). On April 25, 2008, the ALJ issued
8 a decision finding plaintiff not disabled when substance abuse
9 (DAA) is excluded (Tr. 33-41). The Appeals Council admitted
10 additional evidence and denied review on November 13, 2009 (Tr. 9-
11 12). Therefore, the ALJ's decision became the final decision of
12 the Commissioner, which is appealable to the district court
13 pursuant to 42 U.S.C. § 405(g). On January 5, 2010, plaintiff
14 filed this action for judicial review pursuant to 42 U.S.C. §
15 405(g)(Ct. Rec. 1,4).

16 **STATEMENT OF FACTS**

17 The facts are known to the parties and are only summarized
18 here when necessary to explain the Court's decision.

19 Plaintiff was 39 at onset in 2003. He completed a year or two
20 of college with no reported academic difficulty. Mr. Smith has
21 worked as a groundskeeper, laborer, janitor, logger, and
22 agricultural worker (Tr. 205, 210, 226, 365, 485-496, 514-515,
23 542-544). He was charged with felony harassment, eluding, domestic
24 violence, and violating a no-contact order in April and May 2000
25 (Tr. 272-288, 364) and eventually served three months (Tr. 504).

26
27 ¹The Appeals Council remanded for the ALJ to clarify the
28 effect of assessed limitations on the claimant's occupational
base in accord with the Regulations (Tr. 144-145).

1 At the August 2005 hearing Smith testified he stopped working
2 in 2003 because he was afraid of killing himself. He loses
3 concentration, takes "a long time" completing tasks, and has
4 memory problems. He quit drinking nine months before the hearing,
5 in November 2010 (Tr. 497, 502-505, 508).

6 Plaintiff testified in October 2005 his symptoms had not
7 improved (Tr. 541). At the most recent hearing in December 2007,
8 plaintiff testified he was homeless (bouncing from one place to
9 another), has memory problems, and difficulty kneeling (Tr. 564-
10 566).

11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the Act) defines disability as the
13 "inability to engage in any substantial gainful activity by reason
14 of any medically determinable physical or mental impairment which
15 can be expected to result in death or which has lasted or can be
16 expected to last for a continuous period of not less than twelve
17 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
18 provides that a plaintiff shall be determined to be under a
19 disability only if any impairments are of such severity that a
20 plaintiff is not only unable to do previous work but cannot,
21 considering plaintiff's age, education and work experiences,
22 engage in any other substantial gainful work which exists in the
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
24 the definition of disability consists of both medical and
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
26 (9th Cir. 2001).

27 The Commissioner has established a five-step sequential
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
2 is engaged in substantial gainful activities. If so, benefits are
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(I). If not,
4 the decision maker proceeds to step two, which determines whether
5 plaintiff has a medically severe impairment or combination of
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination
8 of impairments, the disability claim is denied. If the impairment
9 is severe, the evaluation proceeds to the third step, which
10 compares plaintiff's impairment with a number of listed
11 impairments acknowledged by the Commissioner to be so severe as to
12 preclude substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
14 App. 1. If the impairment meets or equals one of the listed
15 impairments, plaintiff is conclusively presumed to be disabled. If
16 the impairment is not one conclusively presumed to be disabling,
17 the evaluation proceeds to the fourth step, which determines
18 whether the impairment prevents plaintiff from performing work
19 which was performed in the past. If a plaintiff is able to perform
20 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
21 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
22 residual functional capacity (RFC) assessment is considered. If
23 plaintiff cannot perform this work, the fifth and final step in
24 the process determines whether plaintiff is able to perform other
25 work in the national economy in view of plaintiff's residual
26 functional capacity, age, education and past work experience. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
28 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish
2 a *prima facie* case of entitlement to disability benefits.
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
4 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
5 met once plaintiff establishes that a physical or mental
6 impairment prevents the performance of previous work. The burden
7 then shifts, at step five, to the Commissioner to show that (1)
8 plaintiff can perform other substantial gainful activity and (2) a
9 "significant number of jobs exist in the national economy" which
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
11 Cir. 1984).

12 Plaintiff has the burden of showing that drug and alcohol
13 addiction (DAA) is not a contributing factor material to
14 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
15 The Social Security Act bars payment of benefits when drug
16 addiction and/or alcoholism is a contributing factor material to a
17 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
18 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001); *Sousa v.*
19 *Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is
20 evidence of DAA and the individual succeeds in proving disability,
21 the Commissioner must determine whether DAA is material to the
22 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
23 an ALJ finds that the claimant is not disabled, then the claimant
24 is not entitled to benefits and there is no need to proceed with
25 the analysis to determine whether substance abuse is a
26 contributing factor material to disability. However, if the ALJ
27 finds that the claimant is disabled, then the ALJ must proceed to
28 determine if the claimant would be disabled if he or she stopped

1 using alcohol or drugs.

2 **STANDARD OF REVIEW**

3 Congress has provided a limited scope of judicial review of a
4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
5 the Commissioner's decision, made through an ALJ, when the
6 determination is not based on legal error and is supported by
7 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
8 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
9 "The [Commissioner's] determination that a plaintiff is not
10 disabled will be upheld if the findings of fact are supported by
11 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
12 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
13 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
14 1119 n.10 (9th Cir. 1975), but less than a preponderance.
15 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
16 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
17 573, 576 (9th Cir. 1988). Substantial evidence "means such
18 evidence as a reasonable mind might accept as adequate to support
19 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
20 (1971)(citations omitted). "[S]uch inferences and conclusions as
21 the [Commissioner] may reasonably draw from the evidence" will
22 also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.
23 1965). On review, the Court considers the record as a whole, not
24 just the evidence supporting the decision of the Commissioner.
25 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting
26 *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

27 It is the role of the trier of fact, not this Court, to
28 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court
2 may not substitute its judgment for that of the Commissioner.
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
4 (9th Cir. 1984). Nevertheless, a decision supported by substantial
5 evidence will still be set aside if the proper legal standards
6 were not applied in weighing the evidence and making the decision.
7 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
8 433 (9th Cir. 1987). Thus, if there is substantial evidence to
9 support the administrative findings, or if there is conflicting
10 evidence that will support a finding of either disability or
11 nondisability, the finding of the Commissioner is conclusive.
12 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

13 **ALJ'S FINDINGS**

14 Plaintiff was insured through December 31, 2008, for DIB
15 purposes (Tr. 33, 35). At step one ALJ Gaughen found Mr. Smith did
16 not engage in substantial gainful activity after onset July 1,
17 2003 (Tr. 35, 39). At steps two and three, he found (excluding
18 DAA) plaintiff suffers from narcissistic personality disorder, a
19 severe impairment, but one that does not meet or equal the
20 severity of the Listings (Tr. 36, 38). With DAA included, he
21 suffers from narcissistic personality disorder, an affective
22 disorder (depression/adjustment disorder), and DAA. These
23 impairments alone or in combination do not meet or equal the
24 severity of the Listings but pose moderate and moderate to marked
25 difficulties in functioning, meaning plaintiff is disabled when
26 DAA is included (Tr. 36-38). At step four, relying on the VE, the
27 ALJ found plaintiff can perform past work when DAA is excluded.
28 The ALJ found Mr. Smith is not disabled as defined by the Social

1 Security Act (Tr. 38, 40-41).

2 **ISSUES**

3 Plaintiff alleges the ALJ failed to properly credit the
4 opinions of psychologist Dennis Pollack, Ph.D., and treatment
5 provider Rogelio Cantu, PAC. (Ct. Rec. 14 at 14-17). The
6 Commissioner disagrees. Asserting the decision is free of legal
7 error and supported by substantial evidence, he asks the Court to
8 affirm (Ct. Rec. 19 at 6).

9 **DISCUSSION**

10 **A. Weighing medical evidence**

11 In social security proceedings, the claimant must prove the
12 existence of a physical or mental impairment by providing medical
13 evidence consisting of signs, symptoms, and laboratory findings;
14 the claimant's own statement of symptoms alone will not suffice.
15 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
16 on the basis of a medically determinable impairment which can be
17 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
18 medical evidence of an underlying impairment has been shown,
19 medical findings are not required to support the alleged severity
20 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
21 1991).

22 A treating physician's opinion is given special weight
23 because of familiarity with the claimant and the claimant's
24 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
25 1989). However, the treating physician's opinion is not
26 "necessarily conclusive as to either a physical condition or the
27 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
28 751 (9th Cir. 1989)(citations omitted). More weight is given to a

1 treating physician than an examining physician. *Lester v. Cater*,
2 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
3 given to the opinions of treating and examining physicians than to
4 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
5 (9th Cir. 2004). If the treating or examining physician's opinions
6 are not contradicted, they can be rejected only with clear and
7 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
8 ALJ may reject an opinion if he states specific, legitimate
9 reasons that are supported by substantial evidence. See *Flaten v.*
10 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
11 1995).

12 In addition to the testimony of a nonexamining medical
13 advisor, the ALJ must have other evidence to support a decision to
14 reject the opinion of a treating physician, such as laboratory
15 test results, contrary reports from examining physicians, and
16 testimony from the claimant that was inconsistent with the
17 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
18 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
19 Cir. 1995).

20 **B. Psychological limitations**

21 Plaintiff alleges the ALJ should have credited examining
22 psychologist Dr. Pollack's opinion (Ct. Rec. 14 at 14-16). The
23 Commissioner asserts the ALJ gave specific and legitimate reasons
24 for rejecting this opinion, including the ALJ's consideration of
25 (1) the opinions of examining psychologist Joyce Everhart, Ph.D.,
26 and testifying psychologist Ronald Klein, Ph.D.; (2) plaintiff's
27 diminished credibility and the extent to which Dr. Pollack relied
28 on plaintiff's unreliable self-reporting, and (3) plaintiff's

1 MMPI-2 results suggest malingering, but Dr. Pollack leaves the
2 question of malingering unresolved (Ct. Rec. 19 at 6-8).

3 More than three years before onset, in April 2000, Mr. Smith
4 was admitted to Eastern State Hospital (ESH) for a 15-day
5 competency evaluation in connection with pending felony
6 harassment, felony eluding, and domestic violence charges (Tr.
7 272). His discharge diagnosis included an adjustment disorder with
8 mixed emotional features; episodic alcohol abuse, and mixed
9 personality disorder. His assessed GAF was 75 (Tr. 277).

10 Smith was admitted to ESH a second time in May 2000, for
11 another 15-day evaluation, this time after he was charged with
12 violating a no-contact order. Two weeks earlier he had been served
13 with "divorce papers" (Tr. 288). When discharged May 24, 2000, his
14 assessed GAF was 50-51 (Tr. 290). Records from Spokane Mental
15 Health (SMH) in July and December 2000 show a rule out diagnosis
16 of alcohol abuse and a GAF of 45 (Tr. 340, 355). At discharge in
17 December 2000 "client proved to be here for secondary gain."² No
18 medications were prescribed at discharge (Tr. 326, 356).

19 Dr. Everhart evaluated plaintiff in October 2003, about three
20 months after onset. Mr. Smith suffered diabetes, as well as aching
21 in his head, back, and legs. He gets angry and upset, and is
22 afraid he will be unable to finish anything. For the past two
23 weeks he drank 3 beers a day; before that, he daily drank 8 or 9
24 beers. Dr. Everhart diagnosed adjustment disorder with mixed

25
26 ²The writer goes on to explain Smith was told repeatedly the
27 classes he took at SMH did not meet the court ordered treatment
28 requirements of a domestic violence perpetrator program but he
"apparently did not want to pay for this type of treatment" (Tr.
356).

1 anxiety and depressed moods, rule out alcohol abuse, and
2 narcissistic personality disorder. She assessed a current GAF of
3 61 and 61 as the highest in past year (Tr. 363-367).

4 Dr. Pollack evaluated plaintiff on July 5, 2005, more than
5 two years after onset. He diagnosed alcohol dependence, in
6 remission, and personality disorder NOS. He opined plaintiff's
7 ability to complete a normal workday and workweek is markedly
8 limited; his ability to work in proximity to others and accept
9 instruction and criticism are both moderately limited (Tr. 399-
10 408). Dr. Pollack observes MMPI-2 results suggest the possibility
11 of malingering (Tr. 402).

12 The ALJ considered the opinion of Dr. Klein, who testified at
13 the October 2005 hearing. After reviewing the records he opined
14 plaintiff suffers marked limitations when DAA is included (Tr.
15 526-528). Plaintiff told SMH he spends "a fair amount of time in
16 bars only because he likes to sing karaoke" and "only drinks tea"
17 (Tr. 528). Records indicate a need for alcohol counseling.
18 Plaintiff threatened suicide if "he were to be taken back to
19 jail." He drank daily at least as of October 2003 (Tr. 528).
20 Plaintiff's overly dramatic descriptions of suicide are consistent
21 with patients who do not intend to follow through but instead
22 desire sympathy and emotional support (Tr. 528-529). Dr. Klein
23 describes plaintiff's MMPI-2 results as consistent with
24 manipulation. Plaintiff apparently tried to deceive others about
25 his felony convictions (Tr. 530-531). Dr. Klein doubts lack of
26 money is the real or sole reason plaintiff has not sought mental
27 health treatment since 2002 (Tr. 531-532). He gave Dr. Everhart's
28 opinion the most weight because it was largely consistent with

1 records from ESH and SMH (Tr. 532). Dr. Klein notes the record
2 reveals plaintiff is able to control actions when alcohol free
3 (Tr. 534).

4 To aid in weighing the conflicting medical evidence, the ALJ
5 evaluated plaintiff's credibility and found him less than fully
6 credible (Tr. 38-40). Credibility determinations bear on
7 evaluations of medical evidence when an ALJ is presented with
8 conflicting medical opinions or inconsistency between a claimant's
9 subjective complaints and diagnosed condition. See *Webb v.*
10 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

11 It is the province of the ALJ to make credibility
12 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
13 1995). However, the ALJ's findings must be supported by specific
14 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
15 1990). Once the claimant produces medical evidence of an
16 underlying medical impairment, the ALJ may not discredit testimony
17 as to the severity of an impairment because it is unsupported by
18 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
19 1998). Absent affirmative evidence of malingering, the ALJ's
20 reasons for rejecting the claimant's testimony must be "clear and
21 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
22 "General findings are insufficient: rather the ALJ must identify
23 what testimony not credible and what evidence undermines the
24 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
25 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

26 The ALJ relied on several factors when he assessed
27 credibility, including plaintiff's ability to work after onset
28 without any special accommodations, extensive daily activities,

1 inconsistent statements, and lack of mental health treatment (Tr.
2 35, 39-40).

3 The record supports the ALJ's assessment.

4 The ALJ notes Dr. Everhart's October 2003 test results
5 revealed normal intellectual ability, concentration, and
6 persistence. Mr. Smith could perform multi-step tasks. Her
7 assessed GAF of 61 indicates mild symptoms or difficulties
8 functioning (Tr. 37, 367). The ALJ accurately observes these
9 results contradict plaintiff's testimony he takes a long time to
10 complete work related tasks (Tr. 39, 503). Dr. Everhart's test
11 results undermine memory and concentration problems he reported
12 September 16, 2003 (Tr. 234-235). The ALJ observes Mr. Smith's
13 testimony that he is slow is unsupported by treatment records.
14 Plaintiff has not complained to providers about doing tasks "too
15 slowly," and told Dr. Everhart he has never been told he was too
16 slow on a job (Tr. 39, 365).

17 Activities after onset have included fishing, camping, a
18 stated desire to go dancing, driving, using public transportation,
19 reading, swinging a hammer, shopping, working on cars, gardening,
20 and being able to walk a mile (Tr. 16, 217, 236, 366, 401, 503,
21 505). Significantly, plaintiff did not participate in ongoing
22 mental health treatment after onset in July 2003. He took no
23 psychotropic medications at the October 2005 hearing (Tr. 40,
24 410).

25 The ALJ's reasons for his credibility determination are
26 clear, convincing and supported by substantial evidence. See
27 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)(proper
28 factors include inconsistencies in plaintiff's statements and

1 daily activities). The ALJ is permitted to consider lack of
2 treatment when he assesses credibility. *Burch v. Barnhart*, 400
3 F.3d 676, 681 (9th Cir. 2005).

4 The ALJ is responsible for reviewing the evidence and
5 resolving conflicts or ambiguities in testimony. *Magallanes v.*
6 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
7 trier of fact, not this court, to resolve conflicts in evidence.
8 *Richardson*, 402 U.S. at 400. The court has a limited role in
9 determining whether the ALJ's decision is supported by substantial
10 evidence and may not substitute its own judgment for that of the
11 ALJ, even if it might justifiably have reached a different result
12 upon de novo review. 42 U.S.C. § 405 (g).

13 The ALJ gave clear and convincing reasons supported by
14 substantial evidence for his unchallenged credibility
15 determination.

16 The ALJ rejected Dr. Pollack's assessed limitations and
17 credited the opinions of Drs. Everhart and Klein (Tr. 39-40). The
18 Commissioner correctly points out Dr. Pollack's opinion is
19 ambiguous with respect to test results indicating possible
20 malingering. Resolving ambiguity is the province of the ALJ, not
21 the court.

22 Dr. Pollack's opinion appears based at least in part on
23 plaintiff's unreliable self report. See *Tonapetyan v. Halter*, 242
24 F.3d 1144, 1149 (9th Cir. 2001).

25 In addition to the testimony of a nonexamining advisor, like
26 Dr. Klein, the ALJ must have other evidence to support a decision
27 to reject a treating or examining doctor's opinion, such as
28 contrary reports from other examining doctors, such as Dr.

1 Everhart. *See Magallanes v. Bowen*, 881 F.2d at 751-752. The ALJ's
2 reasons for rejecting Dr. Pollack's contradicted opinion are
3 specific, legitimate and supported by substantial evidence. His
4 credibility determination is supported by clear and convincing
5 reasons. The ALJ properly assessed the opinion evidence of
6 psychological limitations and plaintiff's credibility.

7 **C. Physical limitations**

8 Plaintiff alleges the ALJ should have credited treatment
9 provider Rogelio Cantu, PAC's assessed physical limitations (Ct.
10 Rec. 14 at 16-17). The Commissioner asserts the ALJ properly
11 elected to credit the opinion of examining doctor Kristopher
12 Stanton, M. D. (Ct. Rec. 19 at 8-9). Alternatively, the
13 Commissioner asserts any error is harmless (Ct. Rec. 9-10).

14 Mr. Smith saw Mr. Cantu on October 5, 2005, for a GAU
15 evaluation, more than two years after onset. Plaintiff last worked
16 two years ago, quit taking diabetes medication two years earlier
17 due to cost, had never had a foot exam, and last had his eyes
18 examined "many years ago." He does not monitor blood sugars
19 regularly, denies drinking alcohol, and denies any feelings of
20 depression. He complained of left foot pain and a skin condition
21 (Tr. 411-413). Mr. Cantu assessed an RFC for light work. He opined
22 foot pain causes significant interference with standing and
23 walking, but not sitting. He expected the limitation would last 60
24 days without treatment, and recommended further podiatry and
25 optometry evaluation (Tr. 423-424).

26 A podiatrist recommended a "prefab orthotic" in March 2006
27 (Tr. 443). In July 2007, neuromas and a plantar fibroma were
28 diagnosed (Tr. 444). In August 2007 plaintiff told Kristopher

1 Stanton, M.D., he was working. Mr. Smith was opening an SSI claim.
2 He had been "served papers to begin paying child support of \$535
3 per month." Dr. Stanton told plaintiff he thought he was able to
4 work (Tr. 453-454).

5 At the most recent hearing in December 2007, the VE opined if
6 plaintiff was limited to light work (with the same mental
7 limitations), he could not perform past work but could do work
8 such as housekeeping (Tr. 563). The Commissioner is correct any
9 alleged error in the ALJ's treatment of Mr. Cantu's opinion is
10 harmless. Even if the ALJ fully credited his RFC, plaintiff would
11 remain able to work.

12 CONCLUSION

13 Having reviewed the record and the ALJ's conclusions, this
14 court finds that the ALJ's decision is free of legal error and
15 supported by substantial evidence..

16 IT IS ORDERED:

17 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
18 **GRANTED.**

19 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
20 **DENIED.**

21 The District Court Executive is directed to file this Order,
22 provide copies to counsel for Plaintiff and Defendant, enter
23 judgment in favor of Defendant, and **CLOSE** this file.

24 DATED this 8th day of April, 2011.

25 s/ James P. Hutton

26 JAMES P. HUTTON
27 UNITED STATES MAGISTRATE JUDGE
28